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85-2070

No. _____

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Supreme Court, U.S.
FILED
MAY 19 1986
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAEL O'CONNOR, Petitioner

v.

EDWARD PRINS, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

_____

Michael O'Connor,
petitioner pro se
Box 4031,
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May 15, 1986

TWO QUESTIONS PRESENTED

Question A: Under these conditions: (1) a state constitution that has made public pension payments a timely "contractual obligation" of the state not to be "diminished or impaired thereby"; (2) retirants who secure at retirement a lifelong, vested, protected right to fixed, ministerial, subsistence payments, that lawfully can be divested only by the possible application of a condition subsequent; (3) respondent officials who have admitted (Admission 12, App.32) that petitioner's rights have never been divested: Given these, did respondents violate the Due Process Clause of the 14th Amendment when respondents, applying an established practice, under color of state law, interrupted totally for 8 years (1972-1980), and partly to date, the State's ministerial flow of subsistence to petitioner, for the stated

purpose of compelling the filing of an unauthorized form, but without a statutory charge or cause or cited condition subsequent, or claim then or later of the authority to interfere?

The courts below answered "No." The following decisions indicate a "Yes" answer. See unit VB, herein: Memphis Light, Gas & Water Division v. Craft, infra; Java v. California Department of Human Resources, infra; Logan v. Zimmerman Brush Co., infra; Amy v. Supervisors, infra.

Question B: Under conditions cited in "A" above: Is the 14th Amendment Due Process Clause violated when respondent officials apply under color of state law, a long-standing but unauthorized practice of unilaterally inserting into the statutory contract an unwritten, additional prerequisite on which the ministerial flow of transmittals is

conditioned; the pre-requisite being the filing by the retirant of a form for the illegal shifting of burdens, a form which demands that the reporting retirant supply personal financial information to be used by respondents in applying MCLA 38.219(2), a statutory forfeiture placed on retirants who do public teaching in excess of a stated amount anywhere in the nation; and moreover, is the demand to file a demand to waive the constitutional right to protest the abuse of state power?

The courts below answered, "No". The following decisions indicate a "Yes" answer: Winsett v. McGinness, infra, a 3d Circuit, en banc decision with a substantial progeny: Speiser v. Randall, infra; Philadelphia W. & B.R. Co. v. Howard, infra; Perry v. Sindermann, infra; United States v. Mississippi Power and Light Co., infra.

LIST OF PARTIES

The petitioner is Michael O'Connor, a retired professor of economics at Central Michigan University.

The 14 respondents, sued in their personal capacity, consist of the following: The first ten are past or present members of the Michigan Public School Employees Retirement Board. Edward Prins, C. Max Novak, Frederick P. Davenport, Mrs. Virginia Smith, Carl E. Kleimola, Wilton L. Henderson, Bernard W. Nelson, Mabel G. Matthews, Donna J. Fahlen, Richard L. Carney, Ed Pfau, representative on Board of ex-officio-Board member; Faith Bishop, same; Norvel Hansen, executive secretary, Retirement System; Mrs. Janet Harkness, employee, Retirement System.

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IN THE

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OCTOBER TERM, 1985

MICHAEL O'CONNOR, Petitioner

v.

EDWARD PRINS, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Michael O'Connor, respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 17, 1986, affirming the District Court's judgment and opinions.

I. OPINIONS BELOW

The opinion of the Court of Appeals,

which is not to be published, appears in the Appendix hereto, (App. 1,2). The opinions, orders and final judgment rendered by the District Court for the Eastern District of Michigan, Southern Division also appear in the Appendix hereto, (App. 4-20 inclusive).

II. JURISDICTION

The Court of Appeals was reached under 28 U.S.C. 1291. The decision and opinion of the Court of Appeals for the Sixth Circuit was entered on January 17, 1986. (App. 1,2). A timely petition for rehearing was denied on February 18, 1986 (App. 3), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

III. STATUTES

State's Contractual Obligation: 1963 Mich. Const. Art. IX, Sec. 24:

"The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

"Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities."

Interpretation of First Paragraph of 1963 Const. IX, 24

"What it is designed to do, is to say that when benefits come due, he's got a contractual right to receive them." Official Report, Constitutional Convention I, 770-774 (1961). (Emphasis added).

"...the firmly established right of public employees to receive pension payments as those payments become due." Kosa v. State Treasurer, 408 Mich. 356,371 (1980). (Emphasis added).

* * *

Michigan Public School Employees Retirement Act,

PA, 136, 1945, MCLA 38.201 et seq.

MCLA 38.201(g): "'Annuity' means annual payments for life derived from the accumulated contributions of a member. All annuities shall be paid in equal monthly installments."

MCLA 38.201(h): "'Pension' means annual payments for life derived from money provided by the state. All pensions shall be paid in equal monthly installments."

MCLA 38.222(2): "Once a retirant is in receipt of a retirement allowance from this retirement system, it may not be forfeited." See also MCLA 38.1367.

MCLA 38.219, 1972-1974 form MSA Rev. Vol. 15.893(19):

"If a person is receiving a retirement allowance or other benefit payable...on account of either or both age and years of personal services performed, and becomes employed in any tax supported school or other agency of a state in or territory of the United States, or in any employment covered by out of system service as defined in section 1 of this chapter, (1) in no case shall he be entitled to a new final average compensation or...and (2) his retirement allowance shall be reduced by the amount that his earnings in a calendar year exceed the amount he is permitted to earn without a reduction in benefits

under the federal social security act as from time to time amended, and (3) a retiree whose annual allowance is less than $2,500.00 may earn an additional $1,500.00 without any reduction in benefits. (Effective June 16, 1972 to July 31, 1974). Also see (App. 42-43)

National Scope Partly Revived:

New Retirement Act: PA 300, 1980, Public School Employees Retirement Act of 1979 (sic), MCLA 38.1301 et seq. Sec. 106 links the old to the new.

> MCLA 38.1361: "If a retirant... becomes employed in a tax supported school...of this state,...or with the state for which service credit is granted,..."(b) The retirant's retirement allowance shall be reduced by the amount that the earnings in a calendar year exceed the amount permitted without a reduction of benefits, under the social security act, Chapter 531,49 stat. 620." (Emphasis Added).

IV. STATEMENT OF THE CASE

After teaching in colleges and universities, 1927-1967, petitioner retired

from a post as Professor of Economics, Central Michigan University, and was paid a pension 1967 to 1972, under the Michigan Public School Employees Retirement Act, PA 1945, 136, Chap. 1; MCLA 38.201 et seq., MSA Rev Vol 15.893(1), et seq. This retirement system is compulsory, was contributory in the pre-1967 era, and is separately funded under 1963 Const. IX, 24.

Petitioner sued the Michigan Public School Employees Retirement Board (hereafter, Retirement Board) 1969-1977 concerning unlawful practices, including the way in which the 1969 form of MCLA 38.219(2) was enforced, but he never secured a judgment, pro or con, on MCLA 38.219(2). Procedural concessions were made but not to petitioner.

In 1972, petitioner refused to file the AES-1 form, a form asking for the annual income from teaching, (App.20).

This information was relied upon to enforce MCLA 38.219(2). From July 1972 in response to the refusal, petitioner's vested, contractual payments were blocked to compel the filing of the form, (App. 22). No statutory charge was made, no authority was claimed then or later.

The Retirement Board sponsored the 1974 form of MCLA 38.219(2) which dropped the main cause of the trouble, namely, the nationwide scope of the MCLA 38.219(2) forfeiture. The 1980 revision of the retirement act partly revived the national scope. (See Statutes).

On July 16, 1979, the present lawsuit was begun against 14 individuals in their personal capacity, not their official capacity. They all worked or had worked on or for the Retirement Board or System. The civil action arose under Section 1 of the Civil Rights Act of 1971, Stat. 13; under 42 U.S.C. 1983,

1985 (3), and 1988, to secure protection and redress for the attempted and actual deprivation by respondents under color of state law, of federal constitutional rights and immunities.

The action also arose under the 4th, 5th, 8th, and 14th Amendments; under the impairment clause, Art. I, Sec. 10, Clause 1; and the commerce clause, Art. I, Sec. 8, Clause 3. The jurisdiction of the District Court was based upon 28 U.S.C. Sections 1343, 1331, 2201 and 2202. Petitioner alleged that the matter in controversy exceeded the sum of $10,000 exclusive of interest and costs.

Petitioner's poor health has prevented the filing of an Amended Complaint and a Supplemental Complaint.

A timely demand for a jury trial was docketed on August 22, 1979.

Although Judge Churchill, in the 1980-1981 period, refused to issue a

preliminary injunction, he exerted pressure that forced respondents to stop, in late 1980, the current total blocking, and also to release a major part of the sums withheld over 8 years, releasing $25,778 out of some $31,000 blocked.

Respondents' covering letter (App. 23) gave no explanation of why the payments that had been blocked in 1972 and 1973 were not also released - probably about $5,000 is still withheld in 1986, depreciated to less than half the original value. In 1983, respondents' counsel spoke of urging respondents to release petitioner's money if petitioner would drop the lawsuit. (Transcript, October 19, 1983, pp.18,19).

The focus of this lawsuit is on the abuse of state power in the "as applied" area. The abuse has not lessened through the years despite the courts.

In 1982, the case was assigned to

Judge Joiner, and petitioner filed a motion (hereinafter Motion "G") for a ruling on the constitutionality of MCLA 38.219(2), on its face and as applied; injunctions and an accounting. Motion "G" prayers are at (App. 28).

The importance of Motion "G" results from the District Court declaring it to be a motion for summary judgment (App.6), in the Court's Memorandum Opinion and Order of January 18, 1983, which then denied every part of the motion that was discussed. This 1983 document provided the controlling elements in the grant of the court's summary judgment on August 14, 1984.

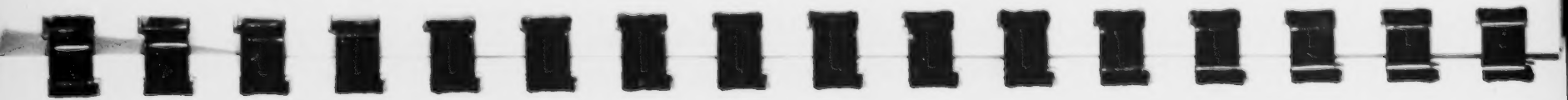
Motion "G" contained three arguments. The first was a simple prima facie case which can be outlined as follows:
(a) As the statutes quoted herein show, petitioner at his 1967 retirement, acquired a vested, protected, contrac-

tual, life-long right to the timely, monthly ministerial transmittal of a small but fixed subsistence payment, unless and until a cited condition subsequent in the contract was lawfully applied to divest petitioner's vested rights. As of retirement on July 1, 1967, petitioner's performance ended, and the State's performance began, under 1963 Const IX, 24. (b) Respondents were assigned purely ministerial duties unless and until they were able to produce the evidentiary facts required for the application of a condition subsequent that could divest the rights of petitioner. (c) As noted, petitioner's pension was blocked from July 1972, on. The years of blocking subsistence payments worked permanent and irrevocable deprivations. (d) But admission no. 12 (App.32) declared that there never had been any divestment of petitioner's

vested rights. (e) Hence respondent's blocking worked deprivations without citing a statutory charge, that is, a condition subsequent; without lawful divestment, and without 14th Amendment due process. (f) From 1972 on, respondents refused to perform their assigned ministerial duties, and have never justified their dereliction.

Respondents made no response to Motion "G" or to this prima facie case, and were not required to do so. The prima facie case was commended and then never again mentioned or answered or dealt with by the Courts below.

The second argument in Motion "G" dealt with the enforcing of MCLA 38.219 (2), the "as applied" procedures, namely: the unilateral insertion into the statutory contract of an unwritten prerequisite (the filing of the form) that must be met before payments would be



released, (App. 21); the use of the form to shift the burden of producing the evidence for applying a forfeiture; the failure to explain that the filing of the form involved a waiver of the 4th Amendment right to personal financial privacy; a waiver of the established right of an individual to reject an agency's unauthorized demand for any information; and a waiver of the 1st Amendment right to reject unauthorized demands that the retirant speak by filing an endorsement of the respondents' abuse of state power.

Also, for those who refused to waive, there existed the years of arbitrary destruction of the contract by blocking at the will and whim of respondents, blocking uncontrolled by the legislature or by any agency rule, and without a known limit on the duration or magnitude of the blockings.

As noted, respondents did not respond to Motion "G". The District Court's response to petitioner's challenge to "as applied" procedures was concentrated on a single page (App.11, 12), plus references (App.13, 19). The statement on (App. 13) is significant. In the Order of March 8, 1983, the District Court states that the order of January 18, 1983, upheld "the procedures adopted by the Retirement Board to enforce..." MCLA 38.219(2). On the word "adopted" see Admissions 14,20,21. (App.36,33,37).

The third argument of Motion "G" dealt with "facial" constitutionality, asserting: (a) That the 1972-74 form of MCLA 38.219(2) infringed on two fundamental liberties, but respondents had no compelling state interest. The District Court (App.9) answered that this "is part of the contract right of the plaintiff." Later, the Court of Appeals

cited as the purpose for MCLA 38.219(2) "that it tends to deter good teachers from retiring at their first opportunity in order to secure employment in another system." (App. 2). (b) That Motion "G" sees MCLA 38.219(2), 1972-74, as placing a double burden (App. 27) squarely and deliberately on interstate commerce without mention of Michigan. The District Court responded by denying the burden and by pointing to the lack of any discrimination "against out-of-state enterprise." (App. 10). (c) That Motion "G" claims that MCLA 38.219(2), 1972-74, in a contract of adhesion, conditions benefits on the forced waiver of the full, free exercise of two fundamental liberties. The District Court points out (App.//) that "The condition is part of the contract right of the plaintiff and does not cause a forfeiture after the fact."

In February 1983, the District Court required that one out of 35 interrogatories (No. 9), be answered by respondents. The answer to No. 9 stated (App. 26) that in 1974 respondents had stopped requiring that the AES-1 form be filed. This revealed for the first time a clear case of deliberate denial of equal protection, since respondents went right on totally blocking petitioner's pension till forced to stop in late 1980.

A few serious misstatements of fact appear in the District Court's opinions. One is toward the bottom of (App. 17). In fact, the MCLA 38.219(2) forfeiture was never applied to petitioner, as indicated on (App. 5, 26, App. 22), etc.

Response of the Courts Below

The District Court's view of both the "facial" and "as applied" aspects of the case is expressed in the penultimate paragraph of the August 14, 1984, Order

(App. 19). The essence of the District Court's ruling on the "as applied" aspect is to be found in the final sentence of (App. 12).

The basis of the ruling by the Court of Appeals is at (App. 2). It is an endorsement of the District Court's Opinions.

Neither court makes an attempt to provide evidentiary factual support for the "as applied" conclusions reached. Respondents never defended on the merits.

V. REASONS FOR GRANTING THE WRIT

A. The Job To Be Done

The basic function of this lawsuit is to push the State's agents toward abandoning the old paternalistic, social welfare policies to which administrators cling with both hands.

In the contractual, ministerial relationship created by 1963 Const. IX, 24, a score of years ago, people can

stand on their own two feet. But respondents do not want that. Many of these agents depend on unauthorized make-work jobs involving control of retirants. See (App. 27) for an example of make-work in the past. Now the old forces have largely shifted to new areas such as medical and dental services. But the nature of the problem remains constant.

In the different world of the 1930's, welfare grants were imperative to meet the special needs of those times. But today, the welfare attitude is a menace because it has come to be accepted and has been allowed to permeate the social order, including such areas as earned benefits.

A few leading states are trying to use contract to strike back at the spread of welfare thinking. Examples are California; New York; Pennsylvania, by the courts; and Michigan. The contracts in

these four states alone must amount to over a million people. The present Michigan retirement system (one of several) now has some 275,000 active members plus more than 60,000 retirants and beneficiaries.

Contract keeps knocking at the door but there are still few to open it. Not enough understanding exists among administrators and legislators. Retirants themselves have a great deal to learn. A contract limits the party to what was earned, without gifts. Contract is discipline, and heaven knows we need discipline.

The degree of administrative antagonism to contract, as contrasted to having the power to control 50,000 retirants, may be judged by the fact that three attempts were made to get essentially the same bill through the Michigan House, HB 6206 in 1978, HB 4733

in 1979, and HB 4877 in 1981-82. The bill aimed to create a new set of powers for this retirement system. The list of new powers began in this way: "Sec. 25. The Retirement Board shall have the following Powers and Duties: (A) to authorize or suspend the payment of a retirement allowance or benefit under this act. (B) to prepare..." etc. This power would have been unlimited, unqualified - in this bill.

Java v. California Department of Human Resources, supra, led the way in requiring due process when suspending contract pensions. We need to move in that direction. Retirants generally must achieve the status of persons with earned rights. Welfare recipients must become a company apart, necessary and essential, but entirely different and small. Welfare destroys freedom.

Once teachers as a whole understand

and accept the earned contract as a standard, the idea will spread. But the position taken by the courts has been and will be controlling. There are few things that the Supreme Court of the United States could sponsor that would help the nation more.

B. The Opinions of the Courts Below in the Present Case Are in Conflict with the Following Decisions

"AS APPLIED"

(a) Petitioner's Prima Facie Case

Memphis Light, Gas & Water Division v. Craft, 436 US 1,20(1978): Interrupted flows can create "a uniquely final deprivation."

Java v. California Department Human Resources, 317 F.Supp. 875,877(1970); aff'd. 402 US 121,133(1971): Due process is essential in suspending pensions in contract states.

Logan v. Zimmerman Brush Co , 455 US 422, 430 (1982): "the hallmark of property... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'."

Mt. Healthy City School District Board of Education v. Doyle, 429 US 274,287(1977). Respondents are required to respond to a prima facie case.

(b). Using the AES-1 Form to Shift the Burden.

Speiser v. Randall, 357 US 513, 528-529 (1958).

"...the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process..."

Philadelphia W. & B.R. Co. v. Howard, 13 (US, 46-56) How. 307,338 340 (1851). The proponent carries the burden.

(c) Adding a Pre-requisite for Contractual Transmittals

Winsett v. McGinness, 617 F.2d 996, 1007-1008, (3d Circ. 1980) (en banc) cert. den., 449 US 1098 (1981). In a case involving prison, liberty, and discretion, the court ruled that a public agency which, on its own, sets up an extra requirement to the obtaining of benefits, violates the due process clause. Perry v. Sindermann, 408 US 593,597 (1972). Government may not deny a benefit on a basis that infringes on constitutionally protected interests.

(d) Lack of Authorization is Decisive

United States v. Rumely, 345 US 41,42 1953). Authority is essential. United States v. Mississippi Power & Light Co., 638 F.2d at 907-908. Three tests for administrative searches: Authorization, probable cause, and some trace of agreement to search. Local Union No. 1055, IBEW v. Gulf Power Co., 146 F.2d 62,64 (5th Circ. 1944)

cert. den. The partial termination of a contract must be expressly authorized.

(e) Liability of Respondents

Amy v. Supervisors, 11 Wall. 136,138 (1870). A public officer is liable for injury wrought by refusal to perform an assigned ministerial act.

"FACIAL"

(a) Commerce

Pike v. Bruce Church, Inc., 397 US 137, 142 (1970). The burden on commerce should be weighed against the putative local benefits.

(b) Conditioning Benefits

Keyishian v. Board of Regents, 385 US 589,606 (1967). Conditioning state employment on the surrender of freedom. Schneckloth v. Bustamonte, 412 US 218, 219 (1973). Also: Johnson v. Zerbst, 304 US 458,464 (1938). The need for voluntary agreement in waiving funda-

mental rights.

C. The Decision Below, Approved by the Court of Appeals, Raises Questions

1. Simple Contradiction Is Not Enough: Due Process, Equal Protection

(a) Admitted: It was admitted, Admission No.12 (App. 32), for the purposes of petitioner's prima facie case, that respondents did deny due process when blocking.

Similarly, respondents admitted the invidious denials of equal protection to a class. See (App. 26) (App. 23) showing oppressive, unequal treatment.

(b) Denials: Nevertheless, the District Court denied that there had been violations of the Due Process and Equal Protection Clauses. There are no facts cited or challenged in support of these conclusions. (App. 12,19).

> "Nothing is clearer than this on a motion for summary judgment: if a

party has made an evidentiary showing warranting a favorable inference, contradiction cannot eliminate it." Morrissey v. Procter & Gamble Co., 379 F.2d 675,677 (1st Circ 1967).

2. Disputed Interpretations and Conclusions:

(a) When respondents' brief on appeal consists of quoting the entire District Court's Opinion; when that Opinion's conclusions state that there has been no denial of due process or equal protection; when the material facts are agreed upon by both petitioner and respondents; and petitioner contends that the facts show that due process and equal protection have been denied, then there is obviously a split as to the conclusions to be drawn from these agreed-upon facts.

(b) Summary judgments should be denied:

"...even where there is no dispute as to the evidentiary facts in the case, but only as to the conclusions to be drawn therefrom." Pierce v. Ford Motor Co., 190 F.2d 910,915 (4th Circ. 1951).

3. The Decisive Absence of Authority.

One reason that respondents never offered a defense on the merits is that respondents' enforcement procedures were never authorized by the legislature, not the blocking, not the AES-1 form, not the insertion of a pre-requisite to payment, not the demand for information, not the withholding of a retirant's vested, overdue money, not the selective release of payments long overdue.

The same absence of authorization is ignored when loose, general defenses are offered, such as: that a need exists for the AES-1 form in order to enforce MCLA 38.219(2) nationwide; or that administrators had a self-imposed duty to determine annually the "eligibility" of 50,000 retirants to receive the fixed, vested payment set at retirement.

Report forms, in particular must be authorized:

> "Agencies may not, without authority, require persons subject to their jurisdiction to file reports." Cooper, Frank State Administrative Law, I, 312.

On implied authority in Michigan see Admission Nos. 14,28 (App.33,41), and Mallchok v. Liquor Control Commission, 72 Mich. App. 341,347 (1976).

4. The "Eligibility" Defense

The Court of Appeals adopts the "eligibility" defense (App. 27) in their description of the AES-1 form, as follows:

> "Plaintiff also contests the requirements that he file periodically a form showing his eligibility for pension benefits without deductions." (App.2).

A few of the unlawful elements in this purely arbitrary "eligibility" theory are these: (a) The "eligibility" theory rejects the whole contractual concept of a life-long vested right established at retirement the minute that the retirant's

performance is complete, and rejects the basic protection of this vested right by the 14th Amendment. (b) The "eligibility" theory rejects the basic concept that due process divestiture, using a condition subsequent in the contract, must precede any invasion of vested protected rights - such as blocking, withholding, destroying timeliness, etc. These illegal invasions are treated as lawful in themselves.

The demands are equally radical: (c) The "eligibility" theory demands that 50,000 retirants file an unauthorized, unlawful, constitutional AES-1 form, accepting the illegal shift of the burden. (d) The theory unilaterally inserts into the contract an added prerequisite to payments, the filing of the form - a clear rejection of the State's contractual obligation, protected by federal and state law.

Both courts below have indicated considerable acceptance of the above-listed departures.

VI. CONCLUSIONS

A writ of certiorari to review the decision and the opinion of the Sixth Circuit on January 17, 1986, should issue because:

1. The Sixth Circuit Court of Appeals has sponsored the view that state officials may require a contracting retirant to satisfy the officials' unilaterally added prerequisite before she can get her vested pension payments; and that the officials may require this without working a denial of due process.

Such a ruling is contradicted by: Winsett v. McGinness, supra, 3d Circ.1980.

2. The Court of Appeals has departed from the accepted and usual course of judicial procedure by tacitly sanc-

tioning the District Court's failure to respond to petitioner's prima facie case; by sanctioning the District Court's ignoring the clear conflict between the two interpretations of the agreed-upon material facts; and by sanctioning the failure of the District Court to claim or cite or challenge any of these agreed-upon facts in supporting the conclusions reached by the court.

3. The opinions of the two courts below are in conflict with a series of decisions by this Court.

Respectfully submitted,

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May 7, 1986